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81-144

No.

IN THE

Supreme Court of the United States

October Term, 1981

JAMES B. KNIGHT,

Respondent,

against

NASSAU COUNTY CIVIL SERVICE COMMISSION: GABRIEL S. KOHN, Chairman; EDWARD S. WITANOWSKI and EDWARD A. SIMMONS, Commissioners; ADELE LEONARD, Executive Director, RONALD J. LEVINSON, Deputy Executive Director; FLORENCE J. CADDLE, Personnel Specialist IV; ALBERT FONTANA, Personnel Specialist IV; and Others,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented.

1. Was the May 18, 1981 decision of the Court of Appeals for the Second Circuit that the transfer of respondent to a Minority Recruitment Program based upon many factors, one of which being his race, a violation of 42 U.S.C. 1983 and Title VII of the Civil Rights Act of 1964, proper and supported by the law and facts?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

JAMES B. KNIGHT,

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against

NASSAU COUNTY CIVIL SERVICE COMMISSION: GABRIEL S. KOHN, Chairman; EDWARD S. WITANOWSKI and EDWARD A. SIMMONS, Commissioners; ADELE LEONARD, Executive Director; RONALD J. LEVINSON, Deputy Executive Director; FLORENCE J. CADDLE, Personnel Specialist IV; ALBERT FONTANA, Personnel Specialist IV; and Others,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

The petitioners respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Second Circuit, entered in the within proceeding on May 18, 1981.

Opinions Below.

The memorandum and order of the Honorable George C. Pratt, Judge of the District Court for the Eastern District of New York, which is not reported, is set forth in the appendix at pages 1a to 13a. The opinion of the Court of Appeals for the Second Circuit, which is not as yet reported, is set forth in the appendix at pages 14a to 23a.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on May 18, 1981. This petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Statutory Provisions Involved.

42 U. S. C. §1983 provides:

> "§1983. Civil action for deprivation of rights
>
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U. S. C. §2000e-2 provides:

> "§2000e-2. Discrimination because of race, color, religion, sex, or national origin

"(a) Employers. It shall be unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Statement of the Case.

Respondent, James B. Knight, commenced employment with petitioner, Nassau County Civil Service Commission, on April 8, 1968, as a Personnel Specialist III. He was thereafter assigned to the Testing Division of the Commission. Also in that Division was Charles Teubner, the head of the Division, and Florence J. Caddle. Both of them were Personnel Specialists IV. Caddle had prior experience in the United States Air Force and had psychometric experience in the area of testing. Respondent did not have this background and worked under close supervision from Teubner.

Over the period of his tenure in the Testing Division, those tests prepared by respondent were more frequently appealed and the appeals granted by the Commission than those prepared by Teubner or Caddle.

In 1969, respondent took the competitive examination for the position of Personnel Specialist IV. He was one of the top three who passed the examination. He was not appointed from that list and Devora Brown and Joseph Chupek were.

In 1973, another test for Personnel Specialist IV was held. Although respondent was again reachable on that list, he was not appointed. Dora Untract and Ruth Roswick were.

During the period herein involved, the Test Development Division was responsible for preparing the many examinations required by the Commission. As time passed, this function was taken over by the New York State Department of Civil Service on an almost exclusive basis. The work of the Division diminished proportionately with the result that few examinations were being prepared by it.

On April 5, 1973, Charles Teubner retired. Florence Caddle, already a Personnel Specialist IV, and with a decidedly better work record and educational background, was named head of the Division. In September, 1973, respondent was transferred to the Recruitment Division. He was then assigned, without objection on his part, to develop a minority recruitment program to attract minority groups into the Civil Service system. Respondent made no objection to this assignment and, in fact, started to prepare a curriculum for the program.

Thereafter, and on or about the 29th day of June, 1976, respondent commenced the within action pursuant to Title VII of the Civil Rights Act of 1964. Commencing on the 26th day of September, 1979, the within action came on to be tried before the Honorable George C. Pratt, Judge of the District Court for the Eastern District of New York, without a jury. During the course of the trial, Judge Pratt

allowed respondent to amend his complaint to assert claims under 42 U. S. C. 1983. In an order and decision dated September 11, 1980, Judge Pratt found for the petitioner herein and dismissed the complaint (1a-13a).

Respondent then appealed to the United States Court of Appeals for the Second Circuit by notice of appeal dated September 30, 1980. In an opinion dated May 18, 1981, that court affirmed the order of Judge Pratt that the failure to promote respondent to Personnel Specialist IV was not actionable. However, it reversed Judge Pratt as to the claims made as a result of the assignment to Minority Recruitment. As set forth, *supra,* one of the factors that led to the assignment was his race. The court remanded the proceeding to Judge Pratt for the formulation of an appropriate remedy (14a-23a).

Reasons for Granting the Writ.

It is the position of petitioners that the writ herein should be issued on the ground that the Court of Appeals for the Second Circuit improperly found that the transfer of respondent was a violation of the statutes involved and seems to be in conflict with other circuits.

As set forth, *supra,* at the time respondent was transferred to Recruitment, petitioners were engaged in planning and devising an affirmative action program to draw minority groups into the Civil Service system. This program was designed to be similar in nature to a program then being administered by the Federal Government. The concept of the program was to teach minorities the method of Civil Service testing. Many factors went into the selection of respondent to head this program. First of all, it was aimed at the Hempstead, New York area in which respondent resided for many years. Thus, he was familiar with the geographical area and presumed to know

the local community leaders. Further, since the aim of the program was designed to teach Civil Service testing procedures, his five years in the Testing Division gave him the background to properly organize and present the subject matter of the program. Further, due to the diminished workload of the Testing Division, there was no longer any work for him to perform in that area. Finally and admittedly so, it was felt by petitioners that respondent, as the highest level black employee of the Commission, would be a proper choice to head the program.

Respondent alleged that the racial consideration was the true reason for the assignment and, thus, was actionable under both statutes herein involved. The law is clear that, in an action brought under 42 U. S. C. 1983, a plaintiff must establish that there was a purposeful intent to discriminate against him. *Washington v. Davis,* 426 U. S. 229 (1976). Absent proof of intent an action under this statute must fail. In an action under Title VII of the Civil Rights Act of 1964, a complaint must be dismissed if a defendant can show valid non-discriminatory reasons for its action. *McDonnell-Douglas Corp. v. Green,* 411 U. S. 729 (1973). Petitioners submit that they properly established a lack of intent to discriminate under 42 U. S. C. 1983 and valid non-discriminatory reasons for the reassignment as to the Title VII action. These reasons are set forth, *supra,* and include background in the testing area, familiarity with the geographical area to be covered, lack of work in his former assignment, and his race.

In the Court below, respondent placed great reliance upon a series of cases to establish that an assignment based upon race is invalid. For example, in *Baker v. City of St. Petersburg,* 400 F. 2d 294 (5th Cir. 1968), black policemen were assigned solely to black areas. These assignments were held by that court to be invalid. However, the rationale of that court was that there was no justification to

assign black policemen to black areas solely due to race. The court did not hold, however, that racial assignments are always invalid.

In *Strain v. Philpott,* 331 F. Supp. 836 (M. D. Ala. 1971), the court found that the reorganization of the Alabama Cooperative Extension System was directly designed to discriminate solely on the basis of race. The reorganization in that case, in effect, demoted black employees from their prior position. Here, too, that court found that an assignment based upon race could be made if there were valid non-discriminatory reasons for it. In short, the cases relied on by respondent do not stand for the proposition that an assignment based upon race is always invalid. Rather, they stand for the proposition that an assignment based upon race, where race is a valid non-discriminatory factor, could be made if the consideration of race was valid to the job to be performed. *United Jewish Organization of Williamsburgh v. Carey,* 430 U. S. 144 (1977); *Drummond v. Fulton County Department of Family and Children's Services,* 563 F. 2d 1200 (5th Cir. 1977).

As set forth, *supra,* racial consideration was only one factor, and a relatively minor one, in making the assignment. Respondent's familiarity with the subject matter of the program, his knowledge of the geographical area, the lack of work in his prior assignment, and his knowledge of Civil Service testing procedures all, petitioners submit, were significantly more compelling than the basis of respondent's race. In comparison, that racial factor was relatively minor, although Judge Pratt placed stress upon it in his memorandum and order. Petitioners thus submit that there can be no finding of discriminatory acts chargeable against them either under *Washington v. Davis, supra,* or *McDonnell-Douglas Corp. v. Green, supra.*

This Court held in *United Steel Workers of America v. Weber,* 443 U. S. 193 (1979), that the formulation of an affirmative action plan was not violative of the Civil Rights Act of 1964 when it seeks to correct a racial imbalance in a work force. Thus, certain preferences could be given affirmatively to minorities to correct prior racial imbalances. This is what petitioners were attempting to do when it created its own plan in 1973 and assigned respondent to head it.

Petitioners thus submit that, if an employer engages in an affirmative action plan, it necessarily follows that it must have the ability to appoint people to administer the plan who have the ability and background to do so. This is what was done here with respondent. He was familiar with the area, familiar with the subject matter of the plan, and he had no further work to do in his prior assignment. Additionally, he was the highest level black in the employ of petitioners. Petitioners submit that, if the creation of an affirmative action program is not actionable, neither is the assignment of personnel to it who may be of the same race as the minority being approached. Clearly, an employer such as petitioners must have the discretion to appoint employees to administer an affirmative action plan who, in the employer's judgment, are best equipped to carry out the intent of the plan. Petitioners thus allege that, in doing so, they should not have been found to have violated 42 U. S. C. 1983 and Title VII of the Civil Rights Act of 1964.

Thus, petitioners submit the appointment of respondent to a constitutionally valid affirmative action program without any objection on his part is not a violation of the statutes herein involved. The Court of Appeals for the Second Circuit was thus in error in finding that the assignment created such a violation.

Conclusion.

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit. The decision of the Court of Appeals for the Second Circuit should be summarily reversed and the complaint dismissed.

Respectfully submitted,

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On the Petition:
ROBERT O. BOYHAN,
Deputy County Attorney.

APPENDIX.

Memorandum of District Court, Dated September 11, 1980.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

JAMES B. KNIGHT,

Plaintiff,

against

NASSAU COUNTY CIVIL SERVICE COMMISSION *et al.*,

Defendants.

Docket No. 76 C 1227

PRATT, J.:

Plaintiff, James B. Knight, employed by the Nassau County Civil Service Commission as a Personnel Specialist III, brought this suit against the commission, its three commissioners, its executive director, its deputy executive director and certain other of its employees, alleging racial discrimination in his employment in violation of Title VII of the Civil Rights Act of 1964. His *pro se* complaint alleged that because of his race the defendants failed to employ him, failed to promote him, and committed certain other discriminatory acts in connection with his employment.

The complaint referred to discriminatory conduct that occurred "on or about and after January 1, 1967", and in his pretrial brief plaintiff's attorney set forth claims that plaintiff had been discriminated against in certain appointments and promotions in 1967 and in 1970. However, such claims can have legal validity against these defendants only for acts committed after March 24, 1972 when the statute was amended to bring municipalities within the requirements of Title VII. *Weise v. Syracuse University,* 522 F2d 397 (CA2 1975). It is to those claims arising after March 24, 1972 that this decision is directed.

The focal point of plaintiff's case is 1973 when Charles E. Teubner, plaintiff's superior in the Test Development Division, retired and was replaced not by plaintiff, but by Florence Caddle, a white co-worker, who then became plaintiff's superior. Plaintiff claims that the preferring of Caddle over him was the result of racial discrimination and, therefore, violated Title VII.

The action was tried before this court sitting without a jury on September 25, 26, 27 and October 2, 1979. At the end of the trial counsel requested an opportunity to submit proposed findings of fact and post-trial memoranda. The court has carefully reviewed plaintiff's pretrial and post-trial memoranda (defendant submitted no memorandum), the findings of fact and conclusions of law proposed by both parties, the testimony at the trial and the exhibits marked in evidence. This decision includes the court's findings of fact and conclusions of law pursuant to FRCP 52(a).

Preliminarily, one evidentiary question was left open at the trial. Plaintiff offered in evidence Exhibit 13, a letter written to plaintiff by Charles E. Teubner who has since died and was unavailable to testify at the trial. Plaintiff offered the exhibit pursuant to FRE 804(b) (5). Defendant's objection to the exhibit is sustained on the ground that plaintiff did not notify defendant of plaintiff's intent to offer the letter until after the first day of trial, and,

therefore, did not comply with the requirement of Rule 804(b) (5) that the proponent of the hearsay statement "makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to meet it, his intention to offer the statement and the particulars of it."

Prior Proceedings

Knight filed with the EEOC a charge of racial discrimination against the Civil Service Commission complaining of the "rules and formulae utilized in rating and ranking of participants" in a June 1973 examination, as well as complaining about certain rulings made with respect to his emergency leaves. By letter dated April 20, 1976, Knight was notified that the EEOC had dismissed his charge, and he was given the right to sue.

Knight's *pro se* complaint, filed June 29, 1976, charged the commission with racial discrimination in failing to employ him, failing to promote him and certain other acts which deprived him of "any professionally appropriate and meaningful participation in agency affairs and operations", and consigned him to conditions of employment "that are physically inadequate, inappropriate, demeaning, and inferior to those provided others of lesser title and grade and who are white".

Knight commenced a proceeding before the State Division of Human Rights. His appeal from an adverse determination there was affirmed by a divided Human Rights appeal board in May 1975 on the ground that there is no evidence in the record to support the charge that Knight was discriminated against because of his race and color. The dissenters thought there should be further investigation by the division.

On judicial review, the New York State Appellate Division, Second Department, annulled the appeal board's determination and, voting 3 to 2, remanded the case to the

State Division of Human Rights for a full evidentiary hearing. At that point, Knight elected to abandon his state remedies and pursue this federal court action which had already been commenced.

Facts

Plaintiff James B. Knight is a 61 year old black man who, after retirement from the United States Army, became employed by the Nassau County Civil Defense in March 1966 and thereafter, in April 1968, was employed by the Nassau County Civil Service Commission as a Personnel Specialist III.

The Civil Service Commission is, of course, an agency of the County of Nassau. Defendants Kohn, Simmons and Witanowski are the three Civil Service Commissioners for Nassau County. Defendant Leonard has been Executive Director of the Commission since 1966. Defendant Levinson has been Deputy Director of the Commission since 1973.

Defendant Caddle began work for the Nassau County Civil Service Commission in April, 1966 when she was hired as a Personnel Technician. On July 7, 1967, that job position was reclassified to Personnel Specialist III. On April 16, 1968, she was promoted to Personnel Specialist IV. Her prior work experience included working as a psychologist for the Proficiency Test Development Division of the Air Force from March 1955 to October 1956. In the Civil Service Commission she was assigned to the examination division, supervised by Teubner. Unlike the plaintiff, Caddle worked with very little direct supervision from Teubner.

The work of the Test Development Division was to prepare the questions and instructions for the many examinations then being given by the Commission. In recent years, the County Civil Service Commission has relied increasingly upon examinations prepared by the New York

State Civil Service Commission, rather than those prepared by its own local people. This has permitted a significant reduction in the number of people needed to prepare examinations. When Teubner retired on April 5, 1973 he was not replaced, but Caddle took over as Knight's supervisor until September 21, 1973 when Knight was transferred to the Recruitment Division. At the top level of the Test Development Division, neither of the two vacancies created by Tuebner's retirement and Knight's transfer have been filled, so that since September 1973 that division has operated with Caddle as the only person responsible for the preparation of examinations. The volume of work of the Test Development Division has greatly diminished as the Commission has relied more and more on examinations prepared by the State Civil Service Commission.

Defendant Fontana has been Knight's supervisor in the Recruitment Division since September 1973.

In June 1969, plaintiff took the promotion examination for the position of Personnel Specialist IV and he was "reachable", i. e., was one of the first three and, therefore, eligible for appointment, on Eligible List #2473 established in August 1969. From that same list Devera Brown, a white female who was also "reachable", was appointed to the position of Personnel Specialist IV. Later, Joseph Chupek, who tied with Knight for third place on Eligible List #2473, was also appointed Personnel Specialist IV.

A subsequent examination for Personnel Specialist IV was held in June 1973, resulting in Eligible List #5449P. From that list, Dora Untracht and Ruth Roswick, both white females, were promoted to Personnel Specialist IV in December 1973 and January 1974, respectively.

While Teubner was in charge of the Examination Division he directly supervised Knight's work. Caddle, who did work similar to Knight, apparently worked independently and with little direct supervision from

Teubner. The basic function of Teubner, Knight and Caddle was to prepare examinations for the many positions filled through the Commission.

Frequently, there would be complaints about instructions, about the wording of questions, about grading, and about various other matters directed at the fairness of the examinations prepared. Under the Commission's procedures, the three member commission itself ruled upon the complaints. As part of its review procedure, the Commission interviewed the preparer of the examinations. All three members of the Commission testified that there was an unusually high proportion of complaints about Knight's exams as opposed to those prepared by Teubner and Caddle. They further testified that when questioned about his exams, Knight was defensive and unwilling to accept criticism.

When the Commission determines that a question had been erroneously marked or was an improper or unfair question, it either corrects or deletes the item. Defendants' Exhibit C summarizes the Commission's actions on appeals allowed with respect to examinations prepared by the three professionals in the Test Development Division. Summarized for the period 4/8/68 to 12/30/77, the performances of the three individuals are as follows:

	Caddle	*Knight*	*Teubner*
No. of tests developed	106	38	78
No. of candidates tested	10,935	3,745	7,480
No. of appeals allowed	4	27	16
No. of items corrected	7	25	6

The foregoing figures reflect work of all three that begins April 8, 1968, but for Teubner it ends in April 1973, for Knight it ends in September 1973, and for Caddle it continues to December 1977. By comparison to the other two, Knight not only did less work, but his work resulted

in a much greater proportion of appeals allowed and items corrected.

With respect to the organization of the staff in the Commission, there are several divisions, each headed by a person classified Personnel Specialist IV. Those divisions are Placement, Recruitment, Classification, Qualifications and Investigation, Test Development, Administration, Transactions for the County, and Transactions for Municipalities. Above each of the division heads are defendant Levinson as Deputy Executive Director, and defendant Leonard as Executive Director. They, too, are classified Personnel Specialist IV. All PS-IVs are white. While there are other black employees of the Commission, only Knight and one other black are in the "Personnel Specialist" categories.

Even before Teubner resigned in April 1973, Leonard had discussed with the Commission the possible change in his assignment because his work in preparing examinations had not been acceptable and had resulted in too many appeals. Knight's PS-III rating qualified him for any department in the Commission. Unlike Caddle, Knight had no psychometric background. Testing problems became more complex in the late 1960s and early 1970s; greater validity and reliability was required on both an administrative and judicial level; and Leonard believed that experience and training in psychometrics was increasingly needed in the Test Development Division.

The appointments of Untracht and Roswick to PS-IV was a matter of the classifications and the budget catching up to the reality. Both had been running their respective divisions for some time before they were actually promoted to the PS-IV rating.

In September 1973, after careful consideration, Leonard reassigned Knight to the Recruitment Division to work under defendant Fontana. The reassignment was made in expectation of developing a program within the Commission to solicite members of minority groups, particularly early blacks and hispanics, to participate in the

Civil Service program, and to take the examinations in order to qualify for Civil Service positions. When the reassignment was discussed at a meeting attended by Knight, Leonard, Fontana and Levinson, Knight did not protest or object to the reassignment. His salary was not reduced, and since that time he has received his regular increments.

According to Leonard, Knight always behaved personally as a gentleman, and always accepted the work that was assigned to him. However, he took an inordinately long time to do the work, and the result was usually convoluted and not up to the quality that was needed. According to Leonard, the only assignment that Knight has completed since being assigned to the Recruitment Division, that is in some six years, was when he was in an emergency requested to review certain examinations. Many times, according to Leonard, he reported for work and sat at his desk doing nothing.

From all appearances, Knight has contributed very little to the overall work of the Civil Service Commission since September 1973, although he has been drawing his full salary and receiving his regular increments. Knight apparently felt that it was inappropriate for him to work in a minority recruitment program. The Commission and Mrs. Leonard obviously felt that of all people in the higher levels of the Commission he was the most appropriate one to convince minority group members that there were opportunities for them within the Civil Service structure.

Commission member Simmons, who is black, testified that in his opinion Knight had not done satisfactory work in preparing examinations. Both Teubner and Caddle, according to him, did better work. He also testified that he had reservations about making Knight the head of any division because he did not appear to have the ability to get along with, motivate and direct people. In Simmons' view, Knight had not been discriminated against during his

period of working for the Commission, but on the contrary, had been favored simply because he was black.

Defendant Kohn, chairman of the Commission, testified that Knight's performance did not in his opinion warrant promotion to PS-IV. Caddle testified and placed in evidence a number of exhibits reflecting appeals taken with respect to examinations, some examples of examinations that were prepared by Knight while he was working under Caddle's supervision, but were not used because they were not properly constructed, examples of particular items [questions] prepared by Knight which were defective from a psychometric point of view, and further examples of Knight's lack of clarity in preparing questions compared with examples of proper questions. Caddle also testified that Knight resented having a woman supervisor.

Fontana testified to the meeting at which the Minority Recruitment Program was explained to Knight and at which the Minority Recruitment Program was explained to Knight and at which Knight was informed that he was being transferred to the Recruitment Division under Fontana's supervision. Fontana recalled no comment or objection by Knight, and Knight testified to none. After the reassignment, Knight complained that the desk provided to him was not an executive desk, but a typing desk; thereafter, Fontana changed the desk for him. According to Fontana, from the fall of 1973 up until 1975, Knight's principal work was in developing drafts for the Recruitment Program and a booklet on taking Civil Service examinations. The drafts were not acceptable. From 1975 to 1979 there were large voids in Knight's work. Fontana's evaluation of Knight was that he was unproductive, had a negative attitude, was unresponsive and, at times, insubordinate. His presence in the recruitment office has had an adverse effect on the morale of the seven other employees working under Fontana's supervision.

Plaintiff's Claims

This action has proceeded on a *pro se* complaint. Although the file contains a motion for leave to file an amended complaint, the motion was never decided and appears never to have been pressed by plaintiff. In addition, at the beginning of the trial, plaintiff's attorney moved to amend his complaint by asserting claims under 42 USC §§1981 & 1983. He stated that there would be no additional evidence, but that he was seeking the additional remedies permitted under those sections. The motion to amend was granted.

As focused by plaintiff's pretrial and posttrial memoranda, plaintiff now claims that defendants have discriminated against him in his employment because of his race. The particular conduct after March 24, 1972 that he refers to includes

1. the promotion to PS-IV of Untracht, Roswick and Chupek;

2. the failure to promote Knight to fill the vacancy left by Teubner;

3. reassignment of plaintiff to the Recruiting Division for the purpose of recruiting blacks;

Plaintiff's claims are asserted both under Title VII and 42 USC §§1981 & 1983.

Discussion

Plaintiff's claims under Title 42 of the United States Code must fail, because under both §§1981 & 1983 plaintiff has failed to establish on the part of any of the defendants any intent to discriminate against him because of his race. *Washington v. Davis,* 96 SCt 2040 (1976). On the

record before the court, if there has been any intentional discrimination with respect to Knight, it has been in Knight's favor and arising out of the Commission's failing to take any disciplinary action against Knight for inadequate work performance and, on occasion, acts of insubordination. The Commission's failure to act has been on the advice of counsel who feared a claim of retaliation should any disciplinary proceedings be brought. In terms of the actual treatment accorded to plaintiff by the defendants, the evidence establishes that defendants have made their employment decisions and particularly their promotions in good faith, based upon examination performance, work performance, and evaluation of the qualifications needed for the heads of the various divisions in the Civil Service operation. The court finds and concludes that none of the defendants has intended to discriminate against plaintiff because of his race.

The basic legal framework for deciding a Title VII action was outlined in *McDonnell-Douglas Corp. v. Green*, 93 SCt 1817. Plaintiff has the initial burden under Title VII of establishing a prima facie case of racial discrimination. He may meet that burden by showing (i) that he belongs to a racial minority; (ii) that he applied for a promotion for which he was qualified; and (iii) that he was rejected for the promotion in favor of a non-minority person.

After this prima facie showing, the burden then shifts to defendant to articulate a legitimate non-discriminatory reason for the plaintiff's rejection. Applied to this case, it is not disputed that plaintiff is black, that he sought to be promoted to replace Teubner as head of the Test Development Division, and that the position was given to Florence Caddle, a female white. Plaintiff, therefore, has made out his prima facie case under *McDonnell-Douglas* and the burden is upon defendants to establish legitimate non-discriminatory reasons for their actions. This burden the defendants have met.

Defendants assert that Caddle was better qualified for the position. Comparing Caddle with Knight, it appears that Caddle was better qualified, did better work, got along with fellow employees better, and performed more efficiently.

Transferring Knight from the Test Development Division to the Recruitment Division was a rational, non-discriminatory act by defendants. His salary and other benefits were unaffected by the transfer. Increased use of state civil service examinations, with resulting decreased use of locally prepared examinations had significantly reduced the need for high level personnel doing test development work.

Certainly, defendants cannot be faulted for seeking to strengthen in 1973 their minority recruitment program. Although plaintiff argues that to select him, a black, to develop such a program and to contact minorities is in itself a form of racial discrimination, the argument is insufficient to vacate defendants' action or to award plaintiff damages. The commission had previously experienced great difficulty in recruiting civil service employees from the black communities. As the only high level black employee in the department, Knight had special significance and superior qualifications for this particular problem that needed a prompt solution. His race specially qualified him for the assignment; unfortunately, his negative attitude prevented him from seeing the challenge and making a significant contribution toward resolving the employment problems of minorities in Nassau County.

There were also legitimate reasons for the promotions of Untracht, Roswick and Chupek to PS-IV. Those promotions merely recognized the fact that each of those people were already performing functions as heads of other divisions in which they had worked for many years. Knight had no experience in those other divisions and was not qualified to perform the work required there.

In light of the foregoing the Clerk is directed is directed to enter judgment dismissing the complaint.

So Ordered.

Dated: Westbury, New York
September 11,1980.

GEORGE C. PRATT
U. S. District Judge

Opinion of the Court of Appeals, Dated May 18, 1981.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 667—September Term, 1980

(Argued February 26, 1981 Decided May 18, 1981)

Docket No. 80-7821

JAMES B. KNIGHT,

Appellant,

—v.—

NASSAU COUNTY CIVIL SERVICE COMMISSION,

Appellee.

Before:

FEINBERG, *Chief Judge,* OAKES, *Circuit Judge,*
and MOTLEY, *District Judge.**

Appeal from the dismissal of appellant's employment discrimination claims after a nonjury trial in the United

* Of the Southern District of New York, sitting by designation.

States District Court for the Eastern District of New York, George C. Pratt, *Judge*. Held that appellee adequately rebutted appellant's prima facie case on the failure to promote claim, but that appellant established a right to relief on his claim regarding assignment to minority recruitment.

Judgment affirmed in part and reversed and remanded in part.

HARVEY W. SPIZZ, Spizz & Gans, Mineola, New York, *for appellant*.

ROBERT O. BOYHAN, Deputy County Attorney (Edward G. McCabe, County Attorney of Nassau County, Mineola, New York, on the brief), *for appellee*.

OAKES, *Circuit Judge*:

This appeal is from the district court's rejection of appellant James Knight's claims that the Nassau County Civil Service Commission racially discriminated against him in his employment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, and the equal protection clause of the Fourteenth Amendment. Specifically, Knight argued that both the Commission's failure to promote him from the position of Personnel Specialist III to Personnel Specialist IV, despite the fact that he had done well on promotional examinations, and his transfer from the Commission's Test Development Division to the Recruitment Division for the purpose of recruiting minority applicants were impermissibly based on racial factors. After a nonjury trial, Judge George C. Pratt of the United States

District Court for the Eastern District of New York found for the Commission on both claims.

We agree with the district court that the Commission adequately rebutted Knight's prima facie case under Title VII on the failure to promote claim, and that Knight did not establish the intentional racial discrimination that would give rise to a violation of equal protection. Accordingly, we affirm Judge Pratt's dismissal of this ground for relief. We reverse on the assignment to minority recruitment claim, however, finding that the assignment constituted an impermissible classification based on race in violation of both Title VII and the equal protection clause.

FACTS

Appellant Knight, a black man, has been employed by the Nassau County Civil Service Commission since 1968 in the position of Personnel Specialist III. From 1968 until 1973, Knight worked in the Test Development Division, preparing civil service examinations for the Commission under the supervision of Charles Teubner, who was a Personnel Specialist IV. Although Knight did well on promotional examinations taken in 1969 and 1973, *i.e.*, he was among the top three on each examination and therefore was eligible for promotion, he was not promoted to Personnel Specialist IV. Instead, between 1969 and 1974, four white applicants, who also were eligible for promotion based on the two examinations, were promoted to level IV positions. Appellee Commission presented evidence below, however, and the district court found, that the latter two promotions (those in 1973 and 1974) were a matter of reclassifications and budget increases catching up with reality, for the two promoted employees had in fact been doing Personnel Specialist IV

work for some time.[1] Knight also complained that he was not promoted to fill Teubner's position when the latter retired in April of 1973. Instead, Florence Caddle, a co-worker of Knight's in the Test Development Division, who was already a Personnel Specialist IV, had been working for the Commission since 1966, had previously worked as a psychologist for the Air Force Test Development Division, and had been working independently and with little supervision from Teubner, took over as head of the Division when Teubner left.

Rather than being promoted within the Test Development Division, Knight was transferred in September of 1973 to the Commission's Recruitment Division, with the expectation that he would participate in a program to encourage more members of minority groups to apply for Civil Service jobs. Knight claimed that both the failure to appoint him to Personnel Specialist IV positions[2] and the reassignment to minority recruitment were based on his race and therefore violated Title VII and the equal protection guarantee of the Fourteenth Amendment.

The Commission admitted that Knight's race was a significant factor in the decision to assign him to minority recruitment.[3] With respect to the failure to promote claim,

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1 Municipalities became subject to Title VII only in 1972 (pursuant to the Equal Employment Opportunity Act of 1972 amendments to Title VII, Pub. L. No. 92-261, 86 Stat. 103), so allegedly discriminatory acts prior to 1972 cannot form the basis for Title VII claims. The promotion of the two white applicants based on the 1969 examination, therefore, is not remediable in this suit.

2 In the Recruitment Division, Knight is still a Personnel Specialist III.

3 The Commission also suggested other factors for the assignment, including Knight's familiarity with testing procedures, which would help him in counseling potential applicants for Civil Service jobs, his residence in the Hempstead area, where the minority recruitment effort was focused, and the decrease in the amount of work to be done in the Testing Division.

however, the Commission argued and the court below found that in recent years the Nassau County Civil Service Commission has increasingly relied upon examinations prepared by the New York State Civil Service Commission, and therefore the County's needs for test development personnel have declined significantly.[4] In addition, in the early 1970s employment qualification testing problems became more complex, with greater test reliability and validity required, and Knight, unlike Caddle, had no background in the field of psychometrics. Most importantly, Knight's work in test development had been of unacceptable quality. Based on statistics from the years 1968 through 1977, the district court found that Knight had prepared significantly fewer examinations than had either Teubner or Caddle, and his tests had resulted in a much greater number of complaints and corrections. There was also evidence that Knight took an inordinately long time to do his work and that the product was often convoluted and unsatisfactory.

Judge Pratt, after a bench trial on Knight's employment discrimination claims under Title VII and 42 U.S.C. §§ 1981 and 1983, found for the Commission.

DISCUSSION

I. *The Failure to Promote Claim*

Judge Pratt held that Knight had made out a prima facie case of discriminatory treatment under Title VII, by showing that he was black, had applied for Personnel Specialist IV positions, had done well on promotional examinations, and was passed over in favor of white applicants. *See*

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[4] In fact, Caddle is now the only employee remaining in the County Commission's Test Development Division; neither of the vacancies created by Teubner's retirement and Knight's transfer has been filled.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The burden then shifted to the Commission "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* The employer thus had the "intermediate evidentiary burden" of producing evidence which "raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Texas Department of Community Affairs v. Burdine*, 49 U.S.L.W. 4214, 4216 (U.S. Mar. 4, 1981). To satisfy this burden, "the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Id.* at 4217. The burden then shifts back to the employee to prove by a preponderance of the evidence that the proffered reasons are unworthy of belief or merely pretextual. *Id.* at 4215-16; *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978) (per curiam); *Lieberman v. Gant*, 630 F.2d 60, 65 (2d Cir. 1980).

Here the reasons presented to the Commission for not promoting Knight to fill Teubner's position (which seems to have been the crux of Knight's failure to promote claim) were that the County's test preparation needs had declined, Knight did not have the proper training to prepare the new kinds of tests that were required, and, most importantly, Knight did not do much work and the work that he did was unsatisfactory. Judge Pratt's findings that Caddle was better qualified for the position, did better work, and was more efficient are not clearly erroneous, *see* Fed. R. Civ. P. 52(a), and certainly satisfy the Commission's burden of production. *See Burdine*, 49 U.S.L.W. at 4217 (defendant employer need not show that person hired or promoted is more qualified than plaintiff, but only that the employment decision was not based upon unlawful criteria).

Knight contends, however, that the Commission failed to carry its burden of production because it presented no "objective competent evidence," but rather only "subjective" evaluations by his superiors. It is true that an employer may not use wholly subjective and unarticulated standards to judge employee performance for purposes of promotion. *See Crawford v. Western Electric Co.*, 614 F.2d 1300, 1313-17 (5th Cir. 1980); *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437, 440-41 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); *Rowe v. General Motors Corp.*, 457 F.2d 348, 358-59 (5th Cir. 1972). But the facts underlying the Commission's failure to promote Knight—his lack of background in the field of psychometrics, the amount of time that he took at his work, and the significantly greater number of appeals and corrections on the examinations he prepared as opposed to those prepared by others in the Test Development Division—can be objectively evaluated. *See generally* Stacey, *Subjective Criteria in Employment Decisions Under Title VII*, 10 Ga. L. Rev. 737, 748-52 (1976). The fact that satisfaction of job performance criteria is judged by an employee's superiors does not necessarily warrant the inference that the evaluations are subjective. Although Knight claims that the three members of the Civil Service Commission (one of whom was black) who ruled on complaints about examinations were not "experts" in psychological testing techniques, there is no evidence that they did not act in a fair and nondiscriminatory manner. Therefore we hold that the Commission met its burden under Title VII of producing admissible evidence of legitimate, nondiscriminatory reasons for its failure to promote Knight. Judge Pratt's finding that Knight failed to carry his ultimate burden of persuasion, *i.e.*, that he failed to prove that the legitimate reasons offered by the Commission for its failure to promote him were false or more pretexts, is not clearly erroneous and will not be disturbed.

In failing to prove disparate treatment for a Title VII claim basied on the failure to promote, *see International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (proof of discriminatory motive required for Title VII disparate treatment cases, though not for Title VII disparate impact cases), Knight has also necessarily failed to meet the purposeful discrimination requirement for a section 1983 violation based on equal protection or a section 1981 claim, *see Personnel Administrator v. Feeney*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229 (1976); *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F.2d 457, 460-61 (5th Cir. 1978).

II. *The Assignment to Minority Recruitment Claim*

The Commission's assignment of Knight to minority recruitment, unlike its failure to promote him, was clearly based in significant part on his race. The Commission apparently thought that Knight would develop a better rapport than would a white person with the members of minority groups whom the Commission was trying to recruit. Although his salary and benefits remained unchanged, Knight claims that the assignment was racist and demeaning.

It is true that Title VII allows employees to be classified on the basis of their religion, sex, or national origin if such a classification "is a bona fide occupational qualification reasonably necessary to the normal operation" of a particular business. 42 U.S.C. § 2000e-2(e); *see* Note, *Race as an Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U.L. Rev. 413, 435-38 (1979). However, Congress specifically excluded race from the list of permissible bona fide occupational qualifications. *See id.* at 436 & n.98; *Detroit Police Officers Association v. Young*, 446 F. Supp. 979, 1004-05 (E.D. Mich. 1978), *rev'd on other*

grounds, 608 F.2d 671 (6th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3466 (U.S. Jan. 10, 1980) (No. 79-1080).

Concededly, it is permissible, both constitutionally and unde Title VII, to take race into account for the purpose of remedying past racial discrimination. Thus, for example, the Supreme Court in *United Steelworkers v. Weber*, 443 U.S. 193, 201-04 (1979), interpreted Title VII as allowing race-conscious affirmative actions plans, but only for the purpose of favoring blacks, which the Court viewed as in furtherance of congressional intent. *See also Fullilove v. Klutznick*, 48 U.S.L.W. 4979 (U.S. July 2, 1980) (limited use of racial criteria to favor minorities in federally-funded public works projects does not violate equal protection). Knight's assignment to minority recruitment, however, was not affirmative action, or benign discrimination, intended to correct racial imbalance. Rather, it was based on a racial stereotype that blacks work better with blacks and on the premise that Knight's race was directly related to his ability to do the job. No matter how laudable the Commission's intention might be—in trying to attract more minority applicants to the Civil Service—the fact remains that Knight was assigned a particular job (against his wishes) because his race was believed to specially qualify him for the work. This is a violation of Title VII. And the other reasons advanced for Knight's reassignment, *e.g.*, lack of work for him to do in testing, though perhaps good reasons for transferring him to the Recruitment Division, do not justify the specific assignment to minority recruitment.

The Commission's assignment of Knight to minority recruitment based on his race is also a violation of equal protection, remediable under 42 U.S.C. § 1983. The Commission conceded racially-based discriminatory intent, the requirement for an equal protection claim, *see Washington v. Davis*, 426 U.S. 229 (1976), and this was not a case of

benign discrimination. Accordingly, the district court's judgment that the assignment to minority recruitment does not violate Title VII or equal protection is reversed. The case is remanded for appropriate relief, although what that may be in terms of monetary damages, as distinguished from injunctive relief, is hard to know.

Judgment affirmed in part and reversed and remanded in part.

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No.

81-144

In The

Supreme Court of the United States

October Term, 1981

JAMES B. KNIGHT,

Respondent,

vs.

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Petitioners.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Respondent had been assigned to a position of recruiting blacks for the Nassau County Civil Service Commission, to a significant measure, concededly because he was black. No evidence was presented that his race in any way exceptionally qualified him for such a position.

Such an assignment was violative of Title VII and the Equal Protection Clause because the courts have consistently held, and Congress has indicated, that race is not a permissible bona fide occupational qualification. The assignment of respondent to a position on the basis of his race was a badge of slavery and stigmatized respondent and caused him to suffer discrimination in the terms and conditions of his employment on the basis of his race in violation of Title VII and the Equal Protection Clause.

ARGUMENT

The racially motivated reassignment of plaintiff to a position recruiting blacks in black geographic areas was a per se violation of Title VII of the Civil Rights Act of 1964 and of 42 U.S.C. §§1981 and 1983.

The record is clear as to race being one of the controlling factors in plaintiff's reassignment to a recruitment job where he was expected to go into black geographic areas of Nassau County and attempt to recruit blacks into Civil Service. Accordingly, plaintiff's equal employment rights, protected by 42 U.S.C. §§1981, 1983 and 2000(e), were violated.

In *Baker v. City of St. Petersburg*, 400 F. 2d 294, 300-301 (5th Cir. 1968), the Court held that the practice of assigning black policemen only to black residential district patrol zones violated the Equal Protection Clause of the Fourteenth Amendment. The Court stated:

> "What the St. Petersburg Police Department did was to superimpose on natural geographic zones an artificial zone that rests on the Department's judgment of Negroes as a class. The Department concluded that Negroes as a class are suitable only for the zone approximately numbered 13. This is the kind of badge of slavery the thirteenth amendment condemns. See the majority and concurring opinions in Jones v. Mayer Co. 1968, 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189. See also United States v. Jefferson County Bd. of Educ., 372 F. 2d at 872-73. However, in this case it is necessary to hold only that a Department's practice of assigning Negroes solely on the basis of race to a Negro enclave offends the equal protection clause of the fourteenth amendment." 400 F. 2d at 300.

Similarly, in *Allen v. City of Mobile*, 331 F. Supp. 1134 (S.D. Ala. 1971), *aff'd. per curiam*, 466 F. 2d 122, it was held that the police department violated §§1981 and 1983 by assigning black officers to patrol only black zones of the city and by assigning black officers only to cases in which either victims or suspects were black. Other cases wherein similar results obtained include: *Strain v. Philpot*, 331 F. Supp. 836, 843-44 (M.D. Ala. 1971) (state cooperative extension service program violated Fourteenth Amendment by assigning black employees to counties which traditionally had black officers in cooperative and by assigning these employees to subject-matter areas dealing primarily with low income farming); and *Wade v. Mississippi Cooperative Extension Service*, 372 F. Supp. 126, 144 (N.D. Miss. 1974), *aff'd. in pertinent part*, 528 F. 2d 508 (5th Cir. 1976) (state agency found to have violated Fourteenth Amendment by assigning blacks to counties with predominantly black clientele).

Washington v. Davis, 426 U.S. 229 (1976) does not in any way diminish the authority of the aforementioned cases inasmuch as the discriminatory action of reassigning Knight clearly had a racially discriminatory purpose, *i.e.*, Knight was intentionally assigned to work in black areas because he was black.

Of course, such assignment practices have also been held to violate Title VII. E.E.O.C. Dec. 70-350, CCH E.E.O.C. Dec. ¶6118 (1969) (assignment of black salesman to "all Negro" accounts because it was good business nonetheless a disparate and racially biased work assignment violative of Title VII); E.E.O.C. Decision No. 71-866 (1970) CCH E.E.O.C. Decisions ¶6191, 3 BNA FEP CAS 265 (charitable organization engaged in running workshops for the training of retarded children violates Title VII by discharging a male instructor and retaining a female instructor on the ground that four of the clients are females); *Rogers v. Equal Employment Opportunity Comm.*, 454 F. 2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S. Ct. 2058, 32 L. Ed. 2d 343 (unlawful to require that employee of a certain minority have contact only with the employer's patients of the same minority group).

Accordingly, the Court of Appeals acted pursuant to existing case law in reversing the District Court's finding that no discrimination had occurred in the racially motivated reassignment of plaintiff. The Court of Appeals correctly noted that Congress specifically excluded race from the list of permissible bona fide occupational qualifications. Moreover, assuming *arguendo* respondent's race was a permissible bona fide occupational qualification for his new job assignment, there was no evidence in the record that his race in any way exceptionally qualified him for his new assigned position.

CONCLUSION

The Court of Appeals acted correctly in reversing that part of the District Court's judgment which found that respondent's assignment to minority recruitment based upon his race was not a violation of Title VII or the Equal Protection Clause.

Respectfully submitted,

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Attorneys for Respondent